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भारतीय राष्ट्रीय राजमार्ग प्राधिकरण
(सड़क परिवहन और राजमार्ग मंत्रालय)
National Highways Authority of India

(Ministry of Road Transport and Highways)
जी-5 एवं 6, सेक्टर-10, द्वारका, नई दिल्ली - 110 075
G-5 & 6, Sector-10, Dwarka, New Delhi-110075

दूरभाष / Phone: 91-11-25074100/25074200
फैक्स / Fax: 91-11-25093507 / 25093514

NHA/DR&A/Arb(Misc)2014

04.04.2014

Circular

Sub: Compliance of Order/Judgment dt. 06.01.2014 of Delhi High Court in the matter of OMP No 4/2014 titled as NHA vs M's Afcon APIL (JV).

In continuation to our letter of even dt. 21.01.2014, it is to inform that NHA had filed a Petition u/s 34 of Arbitration & Conciliation Act, 1996 seeking directions of the Court to set aside the Award dt. 23.08.2013 in respect of Contract Package I (Haveri – Hubli Section). During the hearing, the Court vide order dt. 06.01.2014 (copy enclosed) directed that

"NHA shall, whenever it objects to an Arbitral Award, make a specific disclosure in respect of each claim to which objections are raised, whether similar claims in other cases have been allowed or disallowed; whether the objections preferred by the NHA, or the opposite party, in respect of such claims have been allowed/disallowed; and the stage at which the issues raised by the NHA are pending. If they have been finally concluded, that position should also be indicated. In case the issues stand concluded, the NHA shall specifically explain as to why the same issue is sought to be raised again before the Court.

In my view, the aforesaid is absolute imperative, considering the time consumed in hearing all such like objections to voluminous awards which invariably involve technicality as well.

Mr Sudhir Nandrajog, submit that he shall prepare a claim-wise chart to explain the position with regard to the earlier decisions of the Courts wherever they are available.

This order be communicated to the concerned officers of the Petitioner for compliance in all pending and future cases."

2 Recently vide another order/judgment dt. 03.03.2014 (copy enclosed) passed by Delhi High Court in the matter OMP 276/2014 titled NHA Vs JSC Centrodorstroy vide which NHA has been again directed that

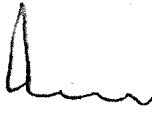
"NHA has not disclosed in the present petition that the issue of transit fee stands concluded by the Division Bench of this Court and lenient view is being taken in this matter, however, the Petitioner (NHA) is put to notice and warned against such lapses in future. A copy of this be communicated to Managing Director (sic) Chairman of the Petitioner for the compliance in future."

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3 In view of the specific directions to NHAI vide above said judgments/orders, the Law Firms/Advocates who would be engaged by NHAI for filing Petition u/s 34 of Arbitration & Conciliation Act 1996, must be instructed to invariably disclose the factual position of the proposed petition to be filed through the Law Firms/Advocates as to whether the issue in question which is being challenged now, has earlier been decided or pending before Delhi High Court (Single Bench or Division Bench) or before Supreme Court.

4 All PIUs/ROs/CMUs and Technical Division of NHAI HQ are hereby requested to ensure the directions/orders of Delhi High Court in future by disclosing the facts in the proposed petition, about the issues /disputes either pending or decided.

5 All PIUs/ROs/CMUs and Technical Division of NHAI HQ are, therefore, requested to kindly ensure the compliance of the aforesaid orders/judgment.


(P C Grover)
CGM (Legal)

Encl: as above

To,

All ROs/PIUs/CMUs and Technical Divisions of NHAI HQ

Copy to Members (A)

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IN THE HIGH COURT OF DELHI AT NEW DELHI
(ORDINARY ORIGINAL CIVIL JURISDICTION)

No. 50/P DHC/Original

Dated 10/01/14

Copy Of Order

NDOH- 22.01.2014

From:

The Registrar General
Delhi High Court
New Delhi.

To,

Ms. Madhu Sweta , Advocate
Counsel for the petitioner,
P-24, Green Park Extension,
New Delhi-110016

✓ National Highways Authority Of India (NHAI)
G 5 & 6, Sector-10, Dwarka,
New Delhi-110075

Through
Project Director,
PIU, NHAI, 1st Cross, Sathur Colony,
Vidyagiri, Dharwad-580004 (Karnataka)

O.M.P. 4/2014

National Highways Authority Of India

....Petitioner

Versus

AFCONS-APIL (Joint Venture)

....Respondent

Sir/Madam,

I am directed to forward herewith for information and necessary compliance a copy of order dated **06.01.2014** passed by Hon'ble Mr. Justice Vipin Sanghi of this Court. A copy of Memo of parties is also enclosed herewith.

Yours faithfully,

H. Gow
9/1/14

Admn. Officer(J) Orgl.
for Registrar General
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Encl. : 1. Copy of the order dated **06.01.2014** passed by Hon'ble Mr. Justice Vipin Sanghi of this Court.

2. Copy of Memo of Parties.

D. Govt. (Govt)
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09/01/14

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IN THE HIGH COURT OF DELHI AT NEW DELHI

(ORIGINAL CIVIL JURISDICTION)

ORIGINAL MISC. PETITION NO. _____ OF 2013

IN THE MATTER OF:

National Highways Authority of India

..... Petitioner

Versus

M/s Afcons-Apil (Joint Venture)

..... Respondent

MEMO OF PARTIES

NATIONAL HIGHWAYS AUTHORITY OF INDIA
G 5 & 6, Sector - 10, Dwarka,
New Delhi - 110075

Through
Project Director,
PIU, NHAI, 1st Cross, Sathur Colony,
Vidyagiri, Dharwad-580004 (Karnataka)

Versus

M/s Afcons-Apil (Joint Venture),
AFCONS House, Shah Industrial Estate,
Veera Desai Road, Azad Nagar P.O.,
P.B. No. 11978, Andheri (West),
Mumbai - 400053

PETITION UNDER SECTION 34 OF THE ARBITRATION
AND CONCILIATION ACT, 1996 FOR SETTING ASIDE
THE AWARD DATED 23.08.2013



Petitioner



Through

Madhu Sweta
[MADHU SWETA, ADVOCATE]
ENROL. NO. D/601/97
Singhania & Partners LLP
Advocates & Solicitors
P-24, Green Park Ext.
New Delhi-110016
Ph. No. 011-47471414

Place: New Delhi
Dated: 21.11.2013



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* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ O.M.P. 4/2014
NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Petitioner

Through: Mr. Sudhir Nandrajog, Sr. Advocate
with Mr. Sumit Gupta & Ms. Madhu
Sweta, Advocates

versus

AFCONS-APIL (JOINT VENTURE)

..... Respondent

Through:

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

ORDER
06.01.2014

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This is a petition under Section 34 of the Arbitration and Conciliation Act, 1996, for setting aside of the Award dated 23.08.2013 passed by the Arbitral Tribunal consisting of three Arbitrators, in respect of a contract entered into between the parties for four laning of KM 340 to KM 404 of Haveri-Hubli section of NH-4 in the State of Karnataka (contract package - 1).

The petitioner has preferred these objections in respect of the claims which have been allowed by the Arbitral Tribunal. The impugned Award runs into 311 pages. The NHAI enters into contracts with contractors on

prescribed formats. The terms and conditions of the Agreements are identical or more or less identical. Similar kinds of disputes and claims arise before the Arbitral Tribunal. This Court has had occasions to deal with several issues and decide them either in favour of the NHAI or against it. In respect of the same issues, matters are pending in appeal either before the Division Bench or before the Supreme Court.

✓ To be able to efficiently and effectively deal with objections, I direct that NHAI shall, whenever it objects to an Arbitral Award, make a specific disclosure in respect of each claim to which objections are raised, whether similar claims in other cases have been allowed or disallowed; whether the objections preferred by the NHAI, or the opposite party, in respect of such claims have been allowed/disallowed; and the stage at which the issues raised by the NHAI are pending. If they have been finally concluded, that position should also be indicated. In case the issues stand concluded, the NHAI shall specifically explain as to why the same issue is sought to be raised again before the Court.

✓ In my view, the aforesaid is absolute imperative, considering the time consumed in hearing all such like objections to voluminous awards which invariably involve technicality as well.

✓ Mr. Nandrajog submits that he shall prepare a claimwise chart to explain the position with regard to the earlier decisions of the courts wherever they are available. Let the same be brought to the Court on 22.01.2014.

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✓ This order be communicated to the concerned officers of the petitioner for compliance in all pending and future cases.

Dasti to counsel for the petitioner.

[Handwritten signature]

VIPIN SANGHI, J

JANUARY 06, 2014

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*True copy
TLT*

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IN THE HIGH COURT OF DELHI AT NEW DELHI
(ORDINARY ORIGINAL CIVIL JURISDICTION)

No. 4973/PDHIC/Original

Dated... 10/03/14

Copy Of Order

NDOH- Disposed Of

From:

The Registrar General
Delhi High Court
New Delhi.

To,

The Managing Director
National Highways Authority of India,
Plot No.G-5-6,
Sector-10, Dwarka,
New Delhi-110045

O.M.P. 276/2014

National Highways Authority Of IndiaPetitioner

Versus

JSC CentrodiostroyRespondent

Sir,

I am directed to forward herewith for information and necessary compliance a copy of order dated **03.03.2014** passed by **Hon'ble Mr. Justice Vipin Sanghi** of this Court. A copy of Memo of parties is also enclosed herewith.

Yours faithfully,

H. Saini
6/3/14

Admn. Officer (J) Orgt.
for Registrar General
th

Encl. : 1. Copy of the order dated **03.03.2014** passed by **Hon'ble Mr. Justice Vipin Sanghi** of this Court.

2. Copy of Memo of Parties.

Manager (DSEA)
As discuss verbally

[Signature]
14/03/14

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IN THE HIGH COURT OF DELHI AT NEW DELHI
ORDINARY ORIGINAL CIVIL JURISDICTION
O.M.P. NO. 278 OF 2014

IN THE MATTER OF:

National Highways Authority of India

Applicant /Employer

Versus

M/s. JSC Centrodorstroy

Respondent

MEMO OF PARTIES

National Highways Authority of India
Plot No. G-5-6,
Sector-10, Dwarka,
New Delhi-110045.

Applicant/Employer

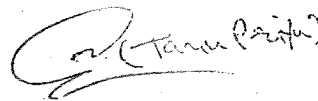
Versus

M/s. JSC Centrodorstroy
C/o M/s. Mukund Ltd.,
508, Pragati House,
47-48 Nehru Place,
New Delhi-110019.

Respondent

APPLICANT
NATIONAL HIGHWAYS AUTHORITY OF INDIA

THROUGH



M. V. KINI & CO.
ADVOCATES & SOLICITORS
KINI HOUSE
6/39, JANGPURA - B
NEW DELHI- 110 014
TEL.: 01124371038/39/40
E-MAIL: delhi@mvkini.com

FILED ON: 27.01.2013
PLACE: NEW DELHI

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* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ O.M.P. 276/2014

NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Petitioner

Through: Ms. Tanu Priya Gupta, Advocate

versus

JSC CENTRODORSTROY

..... Respondent

Through: Mr. Vikas Sharma and Mr. Amit Choudhary, Advocates

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

ORDER

03.03.2014

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1. This petition has been preferred under section 34 of the Arbitration & Conciliation Act, 1996 (the Act) to assail the arbitral award dated 01.11.2013 passed by the arbitral tribunal consisting of three learned arbitrators. The respondent contractor was the claimant before the arbitral tribunal. The claim pertained to the enhanced transit fee on account of revision from Rs.5 per metric tonne to Rs.38 per metric tonne by the Forest Department. The contract was awarded in the year 2001 and the transit fee had been raised as aforesaid in the year 2004. The second claim was for interest on the arrears of enhanced transit fee paid by the respondent.

2. The arbitral tribunal has noted the relevant facts. I may summarise the same as follows.

3. Stone aggregates for the contract works were to be sourced from approved quarries located in Mahoba and Banda areas in U.P. The quarries were located at the distance of approximately 150 kms from the project site, which was located in the State of U.P. Part of the road routes between the quarries and the project site traversed through forest land. Aggregates for the contract work were transported from quarries to the work site from the year 2002 onwards. As aforesaid, at that stage, the transit fee of Rs.5 per metric tonne was payable. The fee was collected by the authorised officials of the UP Forest Department against issuance of "transit passes" in the prescribed form, which were serially numbered. The levy was made under the Uttar Pradesh Transit of Timber and Other Forest Produce Rules, 1978. These rules were amended in the year 2004 vide notification dated 14.06.2004, raising the transit fee to Rs.38 per metric tonne of aggregate. The Forest Department started levying the enhanced transit fee from August 2005 onwards.

4. The enhancement was assailed before the Allahabad High Court. However, the said challenge failed. The matter was carried to Supreme Court, where it is still pending. By interim order dated 23.07.2008, the Supreme Court stayed the realisation of transit fee by the Forest Department. From August 2008 onwards, the UP Forest Department did not charge transit fee on the aggregate. The claim before the arbitral tribunal pertained to the difference between the earlier prescribed transit fee and enhanced transit fee paid during the period August 2005 to July 2008 at the rate of

Rs.33 per metric tonne of aggregate.

5. It is not in dispute that the claim of the respondent for the said enhanced transit fee amounted to "subsequent legislation" in terms of sub clause 70.8 of the Conditions of Particular Application (COPA). The intention to claim the extra cost was notified by the respondent/claimant on 19.11.2005 to the Engineer. When asked for additional documents in support of this claim, they were provided by the respondent/claimant. Justification with details of the amounts claimed, and notification as received from the Forest Department was communicated to the petitioner by the respondent on 28.09.2011. The claim raised was for Rs.4,34,49,186/- for the aforesaid period. The Engineer did not decide on this claim as per the contractual terms. Accordingly, a notice of dispute was served by the respondent on the petitioner on 21.11.2011. The matter was referred to the Dispute Review Board (DRB) on 15.12.2011 for their recommendation under clause 67.1 of COPA. The DRB, however, did not give its recommendation on account of a vacancy, which was not filled by the petitioner. Consequently, the respondent invoked arbitration on 03.10.2012.

6. I may note that the respondent had claimed an additional amount on account of enhanced transit fee, which has been rejected by the arbitral tribunal. The arbitral tribunal has rejected the petitioners submission that clause 70.8 was not applicable, and held that all the conditions for invocation of the said clause were present in this case.

7. The submission of the petitioner - that the respondent was compensated on account of the enhancement of transit fee, due to its inclusion in the price index has been considered and squarely rejected, as the

respondent was able to establish that neither the aggregate nor the transit fee forms a part of the basket, which went into the formulation of the price index. In this regard, the respondent produced the communication dated 12.07.2011 of the wholesale price division of the Ministry of Commerce and Industry. The petitioner was not able to establish otherwise. The aforesaid is a finding of fact which cannot be interfered with in the present proceedings.

8. So far as the quantification of the claim is concerned, the arbitral tribunal has placed reliance on the document, namely, transit passes produced by the respondent, which the petitioner was also required to verify. The confirmation of the amount of transit fee paid by the respondent was also issued by the Forest Department, which has been taken into consideration.

9. Learned counsel for the petitioner submits that the claim was not verified. In this regard, she submits that clause 53 prescribes the procedure for claim. Under clause 53.2, the contractor was obliged to keep the contemporary record and upon notice by the Engineer, to provide inspection of the same to the Engineer. She submits that the respondent furnished the quantified claim along with justification with supporting documents to the Engineer only on 28.09.2011, even though it was first notified on 19.11.2005.

10. In my view, the aforesaid is no ground to assail the findings returned by the arbitral tribunal. It is not the petitioners case that the Engineer had, after being notified of the additional cost on 19.12.2005, required the respondent/contractor to provide inspection of the documents on the basis of which the claim had been notified, and that the respondent had failed or

refused to provide justification for the same. It is evident that the respondent had, in a timely manner, notified the claim and, as and when required, furnished quantification along with justification and supporting documents. Even otherwise, the claim was again confirmed by the Forest Department and the petitioner did not produce any evidence before the arbitral tribunal to create any doubt in regard to the transit fee incurred in the supply of the aggregate. I, therefore, find no merit in this objection of the petitioner.

11. Learned counsel for the petitioner next submits that it has not been established that the aggregate was actually used for the contract in question, as work was undertaken at a different site as well by the same contractor.

12. The aforesaid aspect has also been considered by the arbitral tribunal and rejected in the award. The amount of aggregate used in the contract is, in fact, more than the aggregate in respect of which the claim has been allowed. The source wherefrom the aggregate had to be sourced was duly notified. Even the supplier, namely, Mukand Limited was duly approved by the petitioner. The finding of fact returned by the arbitral tribunal cannot be said to be without any basis or evidence. The petitioner did not lead any evidence to show that the claim for enhanced transit fee pertained to aggregate supplied for any other contract. The said finding is, therefore, not assailable in these proceedings.

13. No other submission has been advanced by learned counsel for the petitioner.

14. I may observe that the issue of transit fee has been decided by this court even earlier. In fact, a Division Bench of this court has dismissed the

appeal preferred by the petitioner NHAI in respect of another award, after the objections to the award had been rejected by the learned Single Judge. The judgment of the Division Bench is found in FAO (OS) No.47/2012 titled *National Highways Authority of India v. Hindustan Construction Co. Ltd.*

15. I may also observe that on 06.01.2014, I had passed an order in O.M.P. No.4/2014 titled *National Highways Authority of India v. AFCONS-APIIL (JV)*, wherein I had directed as follows:

"The petitioner has preferred these objections in respect of the claims which have been allowed by the Arbitral Tribunal. The impugned Award runs into 311 pages. The NHAI enters into contracts with contractors on prescribed formats. The terms and conditions of the Agreements are identical or more or less identical. Similar kinds of disputes and claims arise before the Arbitral Tribunal. This Court has had occasions to deal with several issues and decide them either in favour of the NHAI or against it. In respect of the same issues, matters are pending in appeal either before the Division Bench or before the Supreme Court.

To be able to efficiently and effectively deal with objections, I direct that NHAI shall, whenever it objects to an Arbitral Award, make a specific disclosure in respect of each claim to which objections are raised, whether similar claims in other cases have been allowed or disallowed; whether the objections preferred by the NHAI, or the opposite party, in respect of such claims have been allowed/disallowed; and the stage at which the issues raised by the NHAI are pending. If they have been finally concluded, that position should also be indicated. In case the issues stand concluded, the NHAI shall specifically explain as to why the same issue is sought to be raised again before the Court.

In my view, the aforesaid is absolute imperative, considering the time consumed in hearing all such like objections to voluminous awards which invariably involve technicality as well.

Mr. Nandraj submits that he shall prepare a claimwise chart to explain the position with regard to the earlier decisions of the courts wherever they are available. Let the same be brought to the Court on 27.01.2014.

This order be communicated to the concerned officers of the petitioner for compliance in all pending and future cases".

16. The petitioner was required to comply with the aforesaid direction even in this case, as is evident from the aforesaid order. The same has not been complied with. It has also not been disclosed in the present petition that the issue of transit fee stands concluded so far this court, and the Division Bench of this court, is concerned.

17. I am taking a lenient view in this matter, since learned counsel for the petitioner has limited her submission to the aforesaid aspect, and has not sought to question the claim on the basis that the enhanced transit fee cannot be claimed by the contractor. However, the petitioner is put to notice and warned against such lapses in future. A copy of this order be communicated to the Managing Director of the petitioner for compliance in future.

18. Petition stands disposed of in the aforesaid terms.

LA
Sd/-
/ / /
VIPIN SANGHI, J

MARCH 03, 2014
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